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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 617

PETER PAUL, INC., *et al.*,
Petitioners,

—against—

REDERI A/B PULP,
Claimant-Respondent,

and

REDERI A/B JAMAICA, D/S A/S EIKLAND and SALAMIS A/S,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Peter Paul, Inc. and other owners of cargo lost in the disaster which this litigation concerns, pray that a writ of certiorari be issued to review the judgment of the Court of Appeals for the Second Circuit, which affirmed the decree of the District Court for the Southern District of New York dismissing the libels; and the order of the Court of Appeals denying petitioners' motion for a rehearing.*

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* The names of all petitioners appear on a list following the Appendix to this petition.

Opinions of the Courts Below

The opinion of the District Court for the Southern District of New York appears in the Appendix of this petition (A1-A14)* and is reported at 152 F. Supp. 410. The opinion of the Court of Appeals for the Second Circuit appears in the Appendix (A15-A23) and is reported at 258 F. (2d) 901.

Jurisdiction

The Court of Appeals rendered its judgment on August 27, 1958. The petition for rehearing, filed September 10, 1958, was denied without opinion on October 10, 1958.

The jurisdiction of this Court to review by writ of certiorari the judgment complained of, is covered by 28 U. S. C. sec. 1254 (1) and 2101 (c).

Questions Presented

I

When cargo is lost as the direct result of a vessel's unseaworthiness, does a common carrier satisfy his burden of proving the exercise of due diligence under the terms of the Carriage of Goods by Sea Act if the court cannot determine from the evidence whether the defect which rendered the vessel unseaworthy and caused the disaster, was patent or latent?

* References thus indicated are to the Appendix to this petition.

II

Under the Carriage of Goods by Sea Act, is a common carrier excused from exercising due diligence to guard against a dangerous condition which is generally known to be expectable, because he himself has no actual knowledge of the danger?

Statute Involved

The only statute involved in the case is the U. S. Carriage of Goods by Sea Act, 46 U. S. C. sec. 1300-1315. The particular parts of that Act of interest here, are as follows

(Sec. 1303 (1)):

> "The carrier shall be bound, before and at the beginning of the voyage, to exercise due diligence to—
>
> (a) Make the ship seaworthy;
>
> (b) Properly man, equip, and supply the ship;
>
> * * * *

(Sec. 1304 (1)):

> "Neither the carrier nor the ship shall be liable for loss or damage arising or resulting from unseaworthiness unless caused by want of due diligence on the part of the carrier to make the ship seaworthy, and to secure that the ship is properly manned, equipped, and supplied, * * *. Whenever loss or damage has resulted from unseaworthiness, the burden of proving the exercise of due diligence shall be on the carrier or other persons claiming exemption under this section."

Statement

Petitioners were the owners of cargo which was lost while being carried on the Swedish motorship "Christer Salen" from Philippine ports, Hong Kong and Japanese ports to U. S. ports. Claimant-respondent was the owner of that vessel; and the other respondents were engaged in a common adventure with it on the voyage (Finding 10, A3-4).

The "Christer Salen" sailed from Yokohama, her last port of loading, on February 14, 1951. On the following day she broke in two without abnormal stress of weather. The forward half of the vessel sank and became a total loss with all the cargo in it. The machinery being intact, the after half was sailed back to Yokohama. The lost cargo had a value of approximately $600,000.

The District Court found that the disaster directly resulted from the unseaworthiness of the vessel existing before the commencement of the voyage but that the respondents had exercised due diligence to make her seaworthy. Decree was thereupon entered dismissing the libels and that decree has now been affirmed on appeal.

As the cause of action was against an ocean common carrier for the loss of cargo while being carried at sea, the jurisdiction of the District Court was conferred by Article 3, sec. 2 of the Constitution, and by 28 U. S. C. sec. 1333 (1).

The Opinion of the District Court

Pointing out that the "Christer Salen" was a welded ship, the District Court found (Findings 29-40, 46, A8-A10, A 11): (1) this disaster resulted from a "brittle fracture" which started at the top of the starboard sheer strake (the uppermost strake or line of plates on the ship's side) where the side plates extended 7½ inches above the level of the deck plates; (2) no such fracture could occur unless the sheer strake plate where the fracture commenced was "notch brittle" at the temperature to which it was exposed at the time of fracture and "there must be a 'notch' in the steel at which a fracture may originate"; (3) the "notch" to set off such a disaster can be a small cut, nick or other damage at the top of the sheer strake or it can be a latent defect in the weld or in the steel; (4) the sheer strake plate of the "Christer Salen" where the fracture commenced was in fact "notch brittle" at 30° F., which was an expectable condition, and it contained a "notch" of some type; (5) the "notch" made the vessel unseaworthy and initiated the fracture in the "notch brittle" starboard sheer strake plate under expectable conditions of temperature, wind and sea; (6) for years before this voyage it was known that steel in existing ships might be "notch brittle" and that a fracture initiated at some small defect in a "notch brittle" plate presented the danger that a welded ship might break in two if she was not fitted with "crack arresters."

Finding that the loss of the "Christer Salen" resulted from her unseaworthiness, it was held that due

diligence had been exercised because, the District Court found, the "notch" was a latent defect (Finding 38, A 9).

Although a Board of Investigation in the United States had recommended in 1946 that "crack arresters" be installed in all welded ships to inhibit any such disaster as that which occurred here and their installation would have cost only about $10,000 (Findings 40, 46, A9-10, A 11), the court held that due diligence did not require their installation on the "Christer Salen" (A12-A13).

The Opinion of the Court of Appeals

Reversing the finding below that the "notch" in the starboard sheer strake which rendered the "Christer Salen" unseaworthy, was latent, the Court of Appeals found (A 20): "The notch could have been put into the sheer strake either by external damage, or by a latent defect in a weld or in the steel itself." The Court said (A 22) that it is "virtually impossible to state with any degree of certainty what actually caused the fracture."

The Court of Appeals commented (A 23) that there was evidence that a month prior to the sailing of the vessel from Yokohama she was surveyed at Hong Kong and that the survey report sets out that the ship's shell was then generally in good condition. Finding that there was no affirmative proof establishing the absence of a discoverable notch at the top of the starboard sheer strake when the vessel loaded her

cargo and sailed on her voyage a month after the survey, the Court held (~~A 23~~): (A 72-A 73):

> "However, if positive evidence were required to establish a negative proposition of fact (here absence of a discoverable defect), no carrier could ever discharge its statutory burden of proof."

Although the defect which caused this disaster could readily have come into being after the Hong Kong survey and might have been discovered and remedied by anyone who knew of the danger of such a defect and looked for it, the Court of Appeals held that due diligence did not require examination of the sheer strake subsequent to the Hong Kong survey, which was well before any cargo was loaded and about a month before the vessel sailed from Yokohama. The probability that the "notch" was readily discernible was not negatived, for no examination of the sheer strake was made.

The Court of Appeals found (A 20) that "crack arresters" were well known "as an effective means of preventing fractures" of welded ships; that if installed they would have inhibited this disaster; and that their "installation could have been easily accomplished when she was at her home yard in 1950 at the relatively insignificant expense of $10,000." However, it held that due diligence did not require their installation in this case because her owner "did not know that the Christer Salen was notch brittle and therefore susceptible to a brittle fracture"; and (A 20) "because it was unforeseeable that the ship was *actually* notch brittle" (Italics ours).

The Court commented (A 21): "The Christer Salen had been roaming the seven seas for years without displaying the slightest indication of her latent unseaworthiness"—referring to the "notch brittleness" at 30°F. of the starboard sheer strake plate.

The Court summarized cargo's argument in this connection as follows (A 21):

> "that any owner of an all-welded ship who did not definitely know that his ship was not notch brittle was required at the earliest feasible time to outfit her with crack arresters."

The Court held:

> "We think such a rule imposes too broad a standard of liability."

REASONS FOR ALLOWANCE OF THE WRIT

A

The decision of the Court of Appeals that a common carrier is not obligated to establish that the proven unseaworthiness of his vessel which caused the loss of her cargo was not a readily discoverable defect, is in conflict with the decisions of this Court and of the Courts of Appeal for the Third, Fourth, Fifth and Ninth Circuits.

After finding that external damage to the top of the sheer strake may have been the "notch" which made the "Christer Salen" unseaworthy and caused the disaster (A 20), the Court of Appeals held that the respondent-common carrier was not obligated to establish what defect constituted the "notch"; and that it

did not have the burden of proving that the notch could not have been ascertained by the exercise of due diligence. The Court held that the carrier was not required "to establish a negative proposition of fact (here absence of a discoverable defect) * * *" (A 23).

We respectfully submit that this decision is in conflict with the principle of the decisions of this Court and with the decisions of the Courts of Appeal of the Third, Fourth, Fifth and Ninth Circuits. As a high percentage of admiralty cases are litigated in the Second Circuit, the principle which the Court of Appeals has held to be controlling in this case will—unless reversed—govern most of the cases against ocean common carriers tried in this country, although a conflicting principle will govern similar cases in other circuits.

No means are available to shippers of cargo to establish the seaworthiness of vessels to which they entrust their merchandise, or the activities of the carrier's agents. On the other hand, as the carrier's representatives are on and around the vessel at all times, he has ample opportunity to be fully informed of her condition and of what has been done about her. That is why a common carrier is an insurer and cannot escape liability for the loss of cargo unless he establishes that the loss is "within the exceptional case in which he is relieved from liability" (*The Vallescura*, 293 U. S. 296 at p. 304); and why, if he seeks immunity under some statute, "he may have it, but only upon terms;" he must satisfy with exactitude the condition of a statutory exemption or his status as an insurer makes him liable (*The Isis*, 290 U. S. 333 at pp. 345, 351).

In *The Wildcroft*, 201 U. S. 378, this Court considered the extent of a common carrier's duty to exercise due diligence which is a required condition for the exemptions of Section 3 of the Harter Act (46 U. S. C. sec. 192). This Court said (at pp. 388-9):

> "The discharge of this duty is not left to any presumption in the absence of proof. It is the condition precedent, compliance with which is required of the vessel owner in order to give him the benefit of the immunity afforded by the act. The reason for requiring this proof by the owner is apparent. He is bound to furnish a seaworthy and properly equipped ship for the purpose of the voyage. Whether he has done so is a matter peculiarly within his own knowledge. The inspection which he can give, but which the shipper cannot give for lack of opportunity, will establish whether this duty has been complied with. The whole matter is in the control of the owner. The law says, in substance, that when the owner can show that he has discharged this duty he shall be relieved from errors of navigation and management on the voyage, over which he has not such direct control. It is not a case where there is either the necessity or propriety of resorting to presumptions."

In *The Vallescura*, 293 U. S. 296, this Court considered a case where damage to cargo resulted in part from a sea peril and in part from negligence in the care of the cargo. Pointing out (at p. 304) that a common carrier is a bailee of the cargo entrusted to him and that all the facts upon which he can rely to discharge his duty are "peculiarly within his knowl-

edge and usually unknown to the shipper," this Court said (at p. 304):

> "In consequence, the law casts upon him the burden of the loss which he cannot explain or, explaining, bring within the exceptional case in which he is relieved from liability."

It was there held that the carrier was liable for all the damage to cargo as there was no evidence establishing the extent of the damage which resulted from the sea peril for which the carrier was not liable.

In *Commercial Molasses Corp.* v. *N. Y. Tank Barge Corp.*, 314 U. S. 104, it was held that while a lighterman, as a private carrier, is absolved from liability for the loss of cargo if the evidence leaves in doubt whether or not the sinking of his lighter resulted from unseaworthiness, when a common carrier is involved (at p. 109):

> "The burden rests upon him to show that the loss was due to a excepted cause and that he has exercised due care to avoid it * * *."

The Court continued (at p. 109) that where suit is against a common carrier:

> "the shipper must prevail if, upon the whole evidence, it remains doubtful whether the loss is within the exception."

In *Nederlandsche etc.* v. *Mediterranean etc.*, 17 F. (2d) 586, the Court of Appeals for the Fifth Circuit was definite that if a common carrier would escape his liability as an insurer he must prove a negative—

the absence of a discoverable defect in his vessel—where such a defect could have caused the damage to cargo.

In *Loveland* v. *Bethlehem,* 33 F. (2d) 655, the Court of Appeals for the Third Circuit held that a carrier cannot escape liability for the loss of cargo (at p. 657) "by merely showing such a state of facts that the court is unable to discover how the disaster occurred, or that it might have occurred from something which, if only it were known" would show that the carrier was not liable.

In *Navigazione Libera* v. *Garcia,* etc. (*The Feltre*), 30 F. (2d) 62, the Court of Appeals for the Ninth Circuit held (at p. 64) that a common carrier must negative discoverable unseaworthiness as the cause of disaster if he would avoid liability for the loss of cargo. See, also:

Toyo Kisen etc. v. *Willits etc.*, 17 F. (2d) 762 at p. 763 (C. A. 9);

The Bill, 47 F. Supp. 969, 975, affirmed per curiam on opinion below, 145 F. (2d) 470 (C. A. 4).

In the Second Circuit, when the bench consisted of judges other than those sitting in the present case, it has been held, even in a case where the libellant had the burden of proving negligence, that when damage to a scow results from the unseaworthiness of a towing tug, "the law casts upon him (the tug owner) the burden of showing not only what happened but what was done and what would have been necessary to avert the casualty." *Hudson River Shipyards Corp.*

v. *Metropolitan Sand & Gravel Co.*, 104 F. (2d) 167 at p. 168. See, also:

> *Warner Sugar Ref. Co.* v. *Munson*, 23 F. (2d) 194, affirmed per curiam, 32 F. (2d) 1021 (C. A. 2).

The Carriage of Goods by Sea Act (supra at p. 3) specifically provides that when cargo is lost because of a vessel's unseaworthiness, if the carrier seeks exemption because of the claimed exercise of due diligence, he must prove it. Necessarily, a carrier must establish what defect caused a disaster if he is to prove the exercise of due diligence in relation to it; or he must prove due diligence in relation to all possible defects which could have caused the disaster.

The only evidence offered in the present case which could be considered to relate in any way to the condition of the starboard sheer strake of the "Christer Salen" at Hong Kong, is a report form on which appears this general language as to the vessel's side plating:

> "Shell plating * examined, found or now placed in good condition * *." (Ex. NN; Opinion of Court of Appeals, A 23).

There is no evidence concerning: the competency of the surveyor; his knowledge that a nick or other damage on the top of the sheer strake was dangerous on a welded ship; or as to what, if any, examination he made of the top of the sheer strake. Such general, indefinite evidence has heretofore been held insufficient to establish due diligence as to the seaworthiness of a particular part of a vessel which causes subsequent loss of cargo.

Nederlandsche etc. v. *Mediterranean, etc.*, 17 F. (2d) 586 at p. 587 (C. A. 5);

Hudson River Shipyards Corp. v. *Metropolitan Sand & Gravel Corp.*, 104 F. (2d) 167 (C. A. 2);

Warner Sugar Ref. Co. v. *Munson*, 23 F. (2d) 194, affirmed *per curiam*, 32 F. (2d) 1021 (C. A. 2).

Nevertheless, as the Court of Appeals found that this report sufficiently established that the sheer strake was free of any observable damage at the time of this survey at Hong Kong, for the purpose of this petition we accept that finding.

However, the authorities have heretofore been clear that it is not enough for a carrier to establish seaworthiness of his vessel at a time substantially before she sails on her voyage, when there is ample opportunity for damage to the vessel in the interval and the subsequent loss of cargo could readily have resulted from unseaworthiness coming into being in that interval.

The Oritani, 54 F. (2d) 1075 (C. A. 3), affirming on opinion below, 40 F. (2d) 522—see p. 525;

The Agwimoon, 31 F. (2d) 1006 (C. A. 4), affirming 24 F. (2d) 864—see p. 866;

Artemis Maritime Co. etc. v. *Southwestern, etc.*, 189 F. (2d) 488 at p. 490-1 (C. A. 4);

Ionian St. Co. v. *United Distillers, etc.*, 236 F. (2d) 78 at p. 84 (C. A. 5);

Grace v. *Panama R. R. Co. (The Kilpatrick)*, 285 Fed. 718 at p. 722 (C. A. 2);

Grace St. Co. v. *Anderson (The Nordpol-The Condor)*, 84 F. (2d) 3 at p. 5 (C. A. 2).

The Court of Appeals commented (A 23) that there is no evidence of any accident after Hong Kong "which could have caused noticeable damage to the sheer strake. The captain testified that he observed no damage to the sheer strake and that no such damage was reported to him." However, the Court also pointed out (A 23):

> "the master was unaware of the potential danger in welded ships of cleavage fractures and therefore took no special pains to scrutinize the tops of the sheer strakes. This lack of knowledge coupled with the failure to conduct a rigorous inspection, it is argued, precludes a finding of due diligence. While a master is presumed to know the general characteristics of his ship, he is not required to possess the combined knowledge and skill of a naval architect and metallurgist."

The master testified that he had never examined the top of the sheer strake at all nor had he directed anyone else to do so, because neither the owner nor anyone else had warned him of any particular precaution which should be taken because the "Christer Salen" was a welded ship (AA 32a, 30a)*.

We agree that the master of a ship is not himself "required to possess the combined knowledge and skill of a naval architect and metallurgist." However, it is the established law in the Fourth and Ninth Circuits, as well as in England, that the owner of a vessel *is* required to know all the characteristics of his vessel whether he must learn them from a naval architect, metallurgist or others; and he is obligated to advise

* References to Appellants' Appendix filed in the Court of Appeals are designated "AA".

the master of the care necessary to guard against such dangers as the ship's characteristics present.

The Silverpalm, 94 F. (2d) 776 at pp. 779-80 (C. A. 9);
Bank Line v. *Porter (The Poleric)*, 25 F. (2d) 843 at pp. 844-5 (C. A. 4);
The Bill, 47 F. Supp. 969 at pp. 976-8 (D. Md.), affirmed on opinion below 145 F. (2d) 470 (C. A. 4);
Standard Oil Co. v. *Clan Line*, [1924] A. C. 100 at pp. 107, 109-10, 114, 120-1, 123, 126-7.

In the very recent case of *States Steamship Co.* v. *The United States, et al. (The Pennsylvania)*, 259 F. (2d) 458, the Court of Appeals for the Ninth Circuit had before it a case involving the loss of cargo consequent upon the fracture and sinking of a welded vessel. It was found that the disaster resulted from the vessel's unseaworthiness existing through lack of due diligence.

The Court commented (at p. 467) on the report of the United States Board of Investigation issued in 1946, which contained a warning of the danger presented when a welded ship is subjected to low temperatures and heavy seas; and that to send a ship with "crack sensitive", i. e.: "notch brittle" plates, into frigid waters was to invite disaster. The Court then said (at p. 468):

> "It is altogether possible that the captain did not know, as his superiors did, of the danger of operating a welded ship which had previously suffered a Class 1 fracture through an area where he was likely to encounter extreme cold and

high seas. But the likely operation of the desire on the part of the captain to take the shorter Great Circle route" (referring to the route which would take the vessel through frigid waters) "made the more imperative the obligation of the owner to advise the captain of the advisability of avoiding operating a crack sensitive ship in these areas, and to direct that the ship be taken to her destination in Japan by a route through warmer waters where the likelihood of severe storms would have been less."

The Court then cited its former decision in *The Silverpalm* (supra) where it was held that a vessel was unseaworthy through lack of due diligence when her engines had an inherently dangerous characteristic of which the master was ignorant because the vessel owner, obligated to know of the vessel's characteristics, had not advised the master of this dangerous quality.

Hitherto, when the bench in the Second Circuit has consisted of judges other than those sitting in the present case, the decisions have conformed to those in other circuits. In *Compania General* v. *U. S. (The Elkton),* 49 F. (2d) 700 (C. A. 2), the Court said (at p. 701): "But existing unfitness * * * must be known at the outset; else she is unseaworthy, not being herself suited for her service, and not carrying a crew properly advised as to her needs; *The Schwan,* L. R. (1909) App. Cas. 450; *Standard Oil Co.* v. *Clan Line,* L. R. (1924) App. Cas. 100. Thus seaworthiness may depend upon the knowledge of the ship's company as to how far she has been in fact made ready." This case was cited with approval by this Court in *May* v. *Hamburg (The Isis),* 290 U. S. 333 at p. 348.

See, also:

The Fred E. Hasler, 55 F. (2d) 919 at p. 921 (C. A. 2).

There is no direct evidence that the sheer strake was damaged after the Hong Kong survey, nor is there any evidence that it was not. The ship's officers were ignorant of any danger from a slight nick, cut, or any other damage at the top of the sheer strake and never examined it.

In the month's interval between the Hong Kong survey and the sailing from Yokohama, the vessel loaded cargo at six Philippine ports, at Hong Kong on her second call, and at five Japanese ports. At the first port of call after Hong Kong, 2000 tons of ore were loaded through the hatch just inboard of the starboard sheer strake where the fracture subsequently commenced. The ore was brought to the ship in heavy steel containers each containing two tons of ore which were swung over the ship's side and dumped through the hatch into the hold (AA29a-30a, 108a).

At each of the eleven subsequent ports of loading there was ample opportunity for damage to the exposed top of the sheer strake: more than 1000 tons of logs and lumber were swung on board the vessel and stowed through the hatch or made fast with chains on deck around the hatch, which was just a few feet away from the starboard sheer strake plate which subsequently fractured (AA24a-29a, 110a-111a; Ex. M). Steel girders (called strongbacks) on which the hatchboards rested, were lifted out of the hatchways at all twelve ports of loading, and shore cranes or steel booms must have been used to load cargo.

The Court of Appeals pointed out (A 23):

> "From the time the inspection was made" (at Hong Kong) "to the date the CHRISTER SALEN put out of Yokohama, she was not subjected to heavy weather."

The evidence also establishes that in that period the ship's plates were not subjected to cold weather: prior to the vessel's arrival in Japan she was sailing in the warm waters of the Tropics (Log book translation, Ex. F). Subsequent to Yokohama the plates were chilled by frigid weather—the ship was covered with ice (AA 33a); and as soon as the chilled plates were subjected to the stress of heavy weather, the vessel broke in two. There is every reasonable probability, therefore, that the starboard sheer strake was damaged in some way subsequent to the Hong Kong survey and thus a "notch" was brought about. As the Court of Appeals pointed out (A 21), prior to this voyage: "The CHRISTER SALEN had been roaming the seven seas for years without displaying the slightest indication of her latent unseaworthiness"—referring to the notch brittleness of the starboard sheer strake. It is apparent, therefore, that a "notch" to trigger a disaster was not then in existence.

Lloyd's surveyor at Yokohama agreed that there must have been some unusual condition on this voyage which brought about the disaster (AA 126a).

As it has been found that any little nick, cut or other damage on top of the sheer strake would be a "notch" which could readily lead to disaster; as the ship's officers were ignorant of this danger and never examined the sheer strake; and as there was ample opportunity for the sheer strake to have been damaged subsequent to the Hong Kong survey, the case

is one making particularly appropriate application of the principle of the decisions of this Court and of the Courts of Appeal of other circuits, that where an easily discoverable defect could readily have been the cause of a disaster, there must be definite proof negativing the existence of such a patent defect if a common carrier would escape liability; and that reliance on presumption is not enough.

B

The decision of the Court of Appeals that a carrier must have actual knowledge of a dangerous condition in a welded ship before he is required to guard against it even though that dangerous condition is generally known to be expectable, is contrary to accepted standards of due care.

It was found below: that for years before this disaster "it was generally known * * * that * * * steel in existing ships might be notch brittle" (Finding 39, A 9); that the notch brittleness of the starboard sheer strake plate of the "Christer Salen" at 30° F. was an expectable condition (Finding 32, A 8); that "A notch may consist of a cut, a crack, however minute, or similar damage to a plate; a discontinuity in design or in a weld; an internal lack of homogeneity in the steel" (Finding 31, A 8); that "a fracture initiated in a plate of a welded ship presented the danger that the ship might break in two" if the plates became chilled (Findings 33, 39, A 9); that crack arresters "were well known as an effective means of preventing fractures", that they were efficacious and would inhibit the breaking in two of a welded ship if a fracture commenced (Opinion of Court of Appeals, A18-19, A 20); and that they could

readily have been installed on the "Christer Salen" "when she was at her home yard in 1950 at the relatively insignificant expense of $10,000." (Opinion of Court of Appeals, A 20).

In the official report of the United States Board of Investigation set up by executive order, issued in 1946 and widely circulated in this country and abroad, it was set out that all welded ships should be fitted with "crack arresters" (Ex. 13 at p. 10; Finding 40, A9-10).

The Court of Appeals held that due diligence did not require the installation of "crack arresters" in this case because her owner "did not know that the 'Christer Salen' was notch brittle and therefore, susceptible to a brittle fracture" and "because it was unforeseeable that the ship was *actually* notch brittle" (A 20). (Italics ours.)

The "Christer Salen" carried 10 passengers, a crew of 37 and cargo having a value of some $1,100,000. It is, we think, established law that "the measure of the duty imposed depends upon the cost or difficulty of the precaution, compared with the hazard and the interest at stake". *Great Atlantic & Pacific Tea Co.* v. *Lloyd Brasileiro (The Pocone),* 159 F. (2d) 661 at p. 664 (C. A. 2). See also:

In re Spencer Kellogg & Sons, Inc. (The Linseed King), 52 F. (2d) 129 at p. 132 (C. A. 2).

The decision of the Court of Appeals that due diligence did not require the adoption of readily available means to prevent such a terrible disaster as befell the "Christer Salen" because her owner did not "actually" know that her starboard sheer strake was notch brittle is, we submit, in conflict with decisions

measuring negligence which have long been recognized as authoritative in other circuits. Surely, care to guard against disaster is required even though it is not certain that absence of care will lead to disaster.

Hines v. *Butler,* 278 Fed. 877 at p. 880 (C. A. 4);
Cornec v. *Baltimore & O. R. Co.,* 48 F. (2d) 497 at p. 501 (C. A. 4);
Ekblom v. *Reed,* 271 F. (2d) 399 at p. 400 (C. A. 5);
Interlake Iron Corp. v. *Gartland,* 121 F. (2d) 267 at p. 270 (C. A. 6);
Johnson v. *Kosmos Portland Cement Co.,* 64 F. (2d) 193 at p. 195 (C. A. 6);
Atlantic Transport Co. v. *Rosenberg,* 34 F. (2d) 843 at p. 846 (C. A. 9).

Unless reversed the decision of the Court of Appeals in the present case will hereafter be cited in the Second Circuit as establishing a new standard by which to measure negligence.

Conclusion

As the judgment of the Court of Appeals is in conflict with the decisions of this Court and with those of other Courts of Appeal, and the principles on which the judgment rests are of outstanding importance to maritime interests, consisting of cargo owners, vessel owners and their respective underwriters, we respectfully submit that the case is one which particularly calls for review by this Court.

HENRY N. LONGLEY,
JOHN W. R. ZISGEN,
Counsel for Petitioners.

APPENDIX

Opinion of District Court

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

A 172-7

PETER PAUL, INC., et al.,

Libellants,

and

WESTERN HARDWOOD LUMBER CO., et al.,

Libellants and Cross-Respondents,

against

M. S. "CHRISTER SALEN," her engines, etc., REDERI A/B PULP,

Claimant-Respondent and Cross-Libellant,

and against

REDERI A/B JAMAICA, D/S A/S EIKLAND and SALAMIS A/S,

Respondents.

(Consolidated Cause)

McGOHEY, *J.*

The libellants in twenty-three consolidated causes seek damages for the loss of, or injury to, cargo which resulted when the M/S Christer Salen broke in two while on a voyage from Japan to Pacific coast ports in Canada and the United States. Their claims are against the ship and the owner.

The latter filed a cross-libel against saved cargo and its owners for general average contributions. The respondents are three shipowners alleged to have been in partnership with the owner.

The parties stipulated to try here only the claim of Peter Paul, Inc. for lost cargo and the owner's claims for general average. All other issues raised by the pleadings are deferred.

The owner seeks exemption from liability on the ground that the loss resulted from an excepted cause under the Carriage of Goods by Sea Act.[1]

FACTS

1. At all material times the libellant Peter Paul, Inc. was a Delaware corporation.

2. At all material times this libellant was the owner of a shipment of 4,104 bags of desiccated coconut (macaroon) shipped by Peter Paul Philippine Corporation on board the Christer Salen at Manila, Philippine Islands, under bill of lading No. M-1-SFO, dated January 30, 1951, consigned to order, notify Peter Paul, Inc., at San Francisco by rail to overland to common point.

3. This entire shipment was lost at sea on February 15, 1951, with the Christer Salen's forward part which broke off and sank.

4. Freight on the shipment was paid.

5. Those libellants who have been sued as cross-respondents for contribution in general average had at all material times the status, corporate or otherwise, alleged in the libels and are the parties entitled to sue for such damages

[1] 46 U. S. C. A. § 1300 et seq.

as may have been sustained with respect to their respective shipments, as alleged in the libels, and the parties liable to pay such amounts, if any, as may be due with respect to their respective shipments by way of general average contribution and/or special charges, as alleged in the cross libels.

6. By stipulation, proof of the status, corporate or otherwise, of all libellants not mentioned in the foregoing findings, and their ownership of the respective shipments, as alleged in the libels, has been postponed until after the trial.

7. By stipulation, proof by all of the libellants other than Peter Paul, Inc., of the fact of damage with respect to their respective shipments, as alleged in the libels, has been postponed until after the trial.

8. By stipulation, determination of the extent of the damage, if any, sustained by the libellants with respect to their respective shipments, as alleged in the libels, and the amount of general average contribution and/or special charges, if any, to be paid by the cross-respondents with respect to their respective shipments, as alleged in the cross-libels, has been postponed until after the trial.

9. At all material times Rederi A/B Pulp, the claimant-respondent and cross-libellant, was a corporation duly organized under the laws of the Kingdom of Sweden, and was the owner of the Christer Salen.

10. On May 24, 1947, the claimant-respondent and respondents entered into a joint cargo service agreement known as the "Salen-Skaugen Line Far East Service Agreement," which they amended on December 2, 1949. Among other things, the agreement as amended provides

(1) that Rederi A/B Pulp shall act as manager of the service with full power of appointment of agents to handle the vessels of all parties (2) that profits and losses shall be divided in accordance with a table set out therein; and (3) that each party agrees to defend, indemnify, and hold each other party harmless against and from any and all claims asserted against each such other party by persons not party to the agreement and arising out of or in any manner connected with the use of such indemnifying party's vessels in such service. This agreement was in full force and effect at the time of and with respect to the voyages of the Christer Salen described in the libels.

11. All of the bills of lading, which constituted the contracts of carriage of the shipments described in the libels and cross-libels, were signed for and on behalf of Rederi A/B Pulp and the Christer Salen by their respective duly authorized agents. All bills of lading contained a Jason clause.

12. The Christer Salen was built at the Eriksberg Shipyard at Gothenberg, Sweden. Her keel was laid on February 2, 1944. She was launched in September, 1944 and completed in February, 1945, but was not put into service until June, 1945. All of her hull and deck plates were welded one to the other, but the plates were attached to the frames by rivets.

13. The vessel was classed 100 A-1 by Lloyd's Register of Shipping (hereafter called Lloyd's) and remained so until February 15, 1951 when she broke in two at sea.

14. In January, 1950 the vessel ran ashore on Silino Island in the Philippines, seriously damaging her fore foot. Her repairs were put in charge of a Mr. Gunnar Hjernquist, an engineer and ship surveyor of Gothenberg,

Sweden, who went to Manila and made arrangements for temporary repairs after which the vessel proceeded to Gothenberg for permanent repairs.

15. The repairs were made at the Eriksberg Shipyard in Gothenberg. They were supervised by Mr. Hjernquist and Mr. Bertrand Grauers, a Lloyd's surveyor. After completion of the repairs, the usual certificates were issued confirming that all damage had been repaired and stating that the Christer Salen was considered seaworthy.

16. In May, 1950 the vessel left Gothenberg, under command of Captain Gunnar Batelsson, and proceeded to the Far East via Suez. In the Philippines and nearby ports she loaded cargo for the West Coast of North America. She sailed from Yokohama on September 29, 1950, on the Great Circle route for Vancouver, British Columbia, where she arrived on October 12, 1950.

17. After loading a cargo for Japanese and other Far Eastern ports, the vessel sailed from Vancouver for Kobe on November 21, 1950.

18. During January 6 to 8, 1951 the vessel was dry-docked in Hong Kong and inspected by a Lloyd's surveyor, who issued a certificate recommending that her 100 A-1 class be continued.

19. She then sailed for Philippine ports where cargo was loaded for ports on the West Coast of Canada and the United States towards which she then proceeded via Japan.

20. The bills of lading all incorporated the United States Carriage of Goods by Sea Act (46 U. S. C. A. §§ 1300 et seq.). However, the Hong Kong Carriage of Goods by Sea Ordinance, 1928, was applicable to seven shipments made from the Crown Colony of Hong Kong to Vancouver,

B. C. The Hong Kong Carriage of Goods by Sea Ordinance, 1928, contained substantially the same provisions and exemptions from liability as are contained in the United States Carriage of Goods by Sea Act.

21. On February 14, 1951, at 5:12 P. M., the vessel sailed from Yokohama, her last Japanese port, for Vancouver, B. C. and United States ports. Her draft was then 21'06" forward and 25'02" aft. Shortly after sailing, she took on board 250 tons of water ballast to put her propeller deeper in the water.

22. During the afternoon and night of the 14th and up until about 4:15 P. M. on the 15th, the vessel encountered heavy weather. There was a snowstorm and freezing temperature. There was a heavy sea from the north-north-east (changing to north on the morning of the 15th), and the vessel was pitching, rolling and shipping some water. The wind was undoubtedly strong but how strong it is impossible to say. The log entries are not reliable. The rough log gives the force as 12 on the Beaufort scale. The smooth log written up after the accident gives it as 10. Neither entry was signed. I do not accept either entry. The storm had started before the vessel which carried a few passengers as well as cargo, left port. At about 9:00 P. M. on the 14th, she was hove to and her speed reduced. On the morning of the 15th the lashings of deck cargo aft of the bridge loosened. However, the crew were able safely to correct this and secure the cargo when the ship's course was changed to accommodate her to the sea. Except for this, there was no damage to gear or cargo and no injury to passengers or crew during the heavy weather. The owner certainly did not prove that the weather was any worse than a well found and properly manned ship should be able to withstand; or indeed that it was any worse than her experienced master expected when he left port.

23. At about 4:15 P. M. on February 15, the weather moderated and the master ordered full speed ahead, it being understood, however, by both the master and the chief engineer that this meant only 80% of actual full speed because of the risk of engine damage if she proceeded at actual full speed in the existing seas. During dinner at 6:00 P. M. the guardrails which are put up during bad weather to keep the dinnerware on the table were not used.

24. The evidence does not indicate that, under the circumstances, the master's speed order was improper. He was a man of long experience and, as the events at and following the accident show, resourceful and competent in an emergency.

25. At about 6:45 the master and chief mate having finished dinner, which was taken with the passengers, went to the bridge. The master remarked that the vessel was riding well. Suddenly they heard "a scraping sound" and "felt a bump" and saw the derricks on the fore part of the deck move forward. In less than thirty seconds the vessel had broken in two at a point about the middle of the number 3 hatch. The master immediately sounded the signal for passengers and crew to take lifeboat stations. He also ordered radio distress signals sent out.

26. The forward part of the vessel and the cargo therein were carried off and sank. The after part remained afloat. Although neither gear nor deck cargo on that part was damaged, the vessel or what was left of her was in imminent peril.

27. On the morning of the 16th, the master decided to abandon the voyage to Vancouver and the United States and to seek refuge in Yokohama. He navigated the after part of the vessel under her own power at low speed to that port which was reached on the 18th. As soon as was

possible after arrival, the remaining cargo was discharged and the ship drydocked. She was thereafter fitted with a temporary bow, and in June 1951 sailed for a German repair yard, at which permanent repairs were made.

28. The master testified that just before the vessel broke he and the chief mate noticed off the port bow one wave, much larger than the rest, approaching the ship. Neither log records this. As already noted, the smooth log was written up on the voyage back to Yokohama during which the events which had occurred at the time of and preceding the accident were recalled and discussed by the master and his officers. It seems altogether incredible that if this wave were of such size and violence as to constitute a peril of the sea as the owner now contends, it would have gone unrecorded. I find it was not of such size or violence.

29. The fracture started in one of the plates of the starboard sheer strake at a point somewhere between the top of the strake and the deck weld, a distance of about 7½ inches. It was what is called a "brittle fracture."

30. In order for ship's steel to fracture in this manner, three conditions must exist: (a) there must be a "notch" in the steel at which a fracture may originate; (b) the temperature must be sufficiently low to make the steel notch brittle; (c) the steel must be subjected to stress.

31. A notch may consist of a cut, a crack, however minute, or similar damage to a plate; a discontinuity in design or in a weld; an internal lack of homogeneity in the steel.

32. The starboard sheer strake of the Christer Salen was notch brittle at 30° F., and her starboard stringer plate was notch brittle at 70° F. The notch brittleness found in these plates was not unusual for plates rolled in Germany at the time these were.

33. The temperature encountered by the Christer Salen on February 15, 1951 was such as was to be expected and it was low enough to make her steel brittle.

34. The seas and wind encountered by the Christer Salen on February 15, 1951 were such as were to be expected and they exerted a stress on the starboard sheer strake.

35. The fracture started at a notch in the sheer strake plate. The notch was present when the plate was put into the vessel and made her unseaworthy when she sailed from Yokohama.

36. At and prior to July 1943, when the plates subsequently incorporated in the Christer Salen were rolled, the then known tests for ship's plates were not designed to, and in fact did not, disclose the existence or non-existence of notch brittleness in such steel.

37. The steel used in building the Christer Salen complied with all of Lloyd's then existing requirements. At the time of the accident the vessel was classed 100-A-1.

38. The notch constituted a latent defect which the owner could not discover by means of any known or customary test.

39. In 1950 and for some years prior it was generally known to persons engaged in the building and classification of ships that (a) existing tests did not disclose the existence or non-existence of notch brittleness in ship's steel; (b) steel in existing ships might be notch brittle; and (c) a fracture initiated in a plate of a welded ship presented the danger that the ship might break in two.

40. The large-scale construction of all-welded ships was begun in the United States during World War II. Most of the ships so produced were dry-cargo freighters of the

so-called "Liberty" type. A serious problem arose out of numerous instances in which ships of this type suffered fractures. A Board of Investigation appointed by the Secretary of the Navy stated in a report dated July 15, 1946, that the factors responsible for failures in welded ships built in the United States were weaknesses in (a) design, (b) workmanship, and (c) material. This report further stated that, "until experience can be had with vessels constructed under normal conditions, of improved design, with carefully checked, high quality workmanship, and employing steel of low notch sensitivity, some form of crack arresters, i. e. two or more slots cut in the deck or sides of the ship covered with plating that is riveted in place—should be incorporated in all large welded vessels."

41. Crack arresters do not prevent the occurrence of cracks in ships, nor do cracks always stop at an arrester.

42. By 1950 the United States had installed crack arresters in less than half of its completely welded vessels built during World War II.

43. The American Bureau of Shipping did not then and does not now require the installation of crack arresters in welded vessels which were built without them. Neither does it require crack arresters in new buildings.

44. The information as to welded ships which was gathered in the United States was communicated to those in Great Britain interested in the subject, including the Admiralty Ship Welding Committee and Lloyd's.

45. Lloyd's rules, up to the time of this disaster, did not require the owner of the Christer Salen to fit her with crack arresters, nor did Lloyd's suggest that crack arresters be installed during the repair of the stranding damage in 1950.

46. The installation of crack arresters on the Christer Salen in the usual manner while she was being repaired at Gothenberg in 1950 would have cost about $10,000.

47. The Christer Salen was the first completely welded dry cargo ship classed with Lloyd's that cracked in two.

48. Lloyd's considered installation of crack arresters inadvisable for welded ships built in Great Britain and in Sweden because (1) such ships had been built without the difficulties encountered in building Liberties in the United States, i. e. poor design, inexperienced workmen, and use of notch sensitive steel which resulted from a shortage of manganese in the United States and in turn resulted in ship steel with an excess of carbon; (2) Lloyd's believed that the work of installing crack arresters might create notches in the ship's plates which could be the starting points of fractures.

49. The nature of the damage sustained by the Christer Salen in the Silino stranding, in the opinion of Lloyd's experts, proved that her steel was not brittle but ductile. The plates of the Christer Salen were only one-half as thick as those in Liberty ships and thus were less likely to crack.

50. The master of the Christer Salen had not been informed by the shipowner, nor did he have any independent knowledge, that the danger of fracture was greater in a welded ship than in a riveted ship. This circumstance had no causal relation to the accident.

51. The fracture of the Christer Salen did not result from any damage to her plates during loading or from improper stowage of her cargo.

The libellants do not contend that the owner's failure to discover the defect in the starboard sheer strake plate constituted lack of due diligence. They contend rather that in light of the "mass of data known to all those interested in shipping, long before 1950, establishing the dangers presented by a welded ship; * * * in the exercise of ordinary prudence, Lloyd's, as the vessel owner's agency which it employed to make the vessel seaworthy, should have required the installation of crack arresters when the vessel was being repaired at Gothenberg in 1950"; that Lloyd's was negligent in failing so to require and its negligence "was lack of due diligence by the vessel owner."

These contentions are rejected. There was, it is true, considerable data concerning the failures of welded ships built in the United States. However, as the findings show, that data revealed conditions as to design, workmanship and quality of steel in the American ships which Lloyd's, for adequate reasons, concluded did not obtain in welded ships such as the Christer Salen. The studies of welded ship failures in the United States showed that the steel in those ships was brittle because it contained an excess of carbon over manganese; and being one inch in thickness was more likely to crack than thinner steel. Lloyd's found in 1950 upon examining the Christer Salen's steel damaged in the stranding, that it was not brittle but ductile. And it was only one-half inch thick. Moreover, at that time no dry cargo ship such as the Christer Salen classified by Lloyd's, had ever suffered a fatal fracture. Lloyd's experts studied all the data on ship fractures compiled by both the United States and Britain. They came to the conclusion that the defects in material and design which were the chief causes of failure in the United States Liberties, were absent in ships built in Sweden at the time of the Christer Salen's construction. Furthermore, they then believed that the work of installing crack arresters

in existing ships could and might produce notch effects in their plates which in turn could and might initiate fractures. These conclusions were not arrived at arbitrarily or carelessly but after serious extended study. Indeed their views found considerable support in the fact that the Americans had not installed crack arresters in at least half of all existing Liberty ships and in the further fact that the American Bureau of Shipping did not require their installation in existing welded ships. In these circumstances there is no reasonable basis for holding Lloyd's negligent in following the views of their own experts rather than others.[2]

The libellants further contend that since the shipowner may not delegate its duty to exercise due diligence, its reliance on Lloyd's is not enough to exempt it from liability. The argument is that since the owner itself knew or is charged with knowing all of the data gathered in the United States, in light of that data, Lloyd's views to the contrary notwithstanding, the owner in the exercise of due diligence should have ordered the installation of crack arresters when the vessel was being repaired in 1950. This argument seems to me to read "due diligence" out of the statute. In view of the sharp difference of opinion between Lloyd's experts and some, though not all, American experts, I think common prudence dictated that the owner rely on the judgment of those experts under whose supervision its vessel had been built and repaired and who regularly surveyed and passed it for classification as a seaworthy vessel.[3] Mr. Murray testified that if the owner had proposed installing crack arresters in 1950, Lloyd's

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[2] See *Louis-Dreyfus, et al.* v. *Paterson Steamships, Ltd.*, 2 C. 67 F. 2d 331 at 333.

[3] See *Balfour, Guthrie & Co., Ltd.* v. *American-West African Line*, 2 C. 136 F. 2d 320 at 321; *The Troubador*, 98 F. Supp. 207 at 210.

in his opinion, would have disapproved. This the libellants urge should be disregarded as "speculation • • • advanced in defense of Lloyd's without any reasonable basis." I think, on the contrary, that this opinion has a very reasonable basis. Indeed, disapproval of such a proposal by the owner, appears to be the only position Lloyd's could have taken consistent with the views of its experts. Mr. Murray impressed me as highly competent and equally trustworthy. He was, to be sure, defending Lloyd's and his own position. But on both direct and cross-examination he obviously tried to be objective, frank and entirely fair. The reasons he gave for this and other opinions seemed to me altogether plausible and reasonable. I accept his opinion.

In 1954, it is true, Lloyd's amended its rules so as to require that all-welded vessels be fitted with some crack arresting device. This, however, as libellants concede, does not show negligence in not requiring such devices in 1950.

I am satisfied that, under all the circumstances existing in 1950, Lloyd's was not negligent in taking the position it did at that time and that the owner exercised due diligence to make the Christer Salen seaworthy.

It follows from the foregoing that the owner is entitled to general average contributions from the saved cargo. Determination of the amount of such contributions will be referred to a Commissioner if the parties are unable to agree on it.

Submit on notice a proposed decree in accordance herewith.

Dated: New York, N. Y., June 19, 1957.

JOHN F. X. McGOHEY,
U. S. D. J.

Opinion of Court of Appeals, Second Circuit

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 146—October Term, 1957.

(Argued February 6 and 7, 1958 Decided August 27, 1958.)

Docket No. 24802

PETER PAUL, INC., *et al.*,
Libellants-Appellants,

—v.—

REDERI A/B PULP,
Claimant-Respondent-Cross
Libellant-Appellee, et al.

Before:

MEDINA, WATERMAN and MOORE,
Circuit Judges.

Appeal from the United States District Court for the Southern District of New York, John F. X. McGohey, *Judge.*

Libellants-appellants, owners of lost or damaged cargo aboard the M/S Christer Salen, appeal from the dismissal on the merits (152 F. Supp. 410) of thirteen consolidated libels seeking recovery *in personam* against the owner and operators of the vessel and *in rem* against the vessel for the losses allegedly sustained.

Affirmed.

Opinion of Court of Appeals, Second Circuit

MOORE, *Circuit Judge*:

On February 15, 1951 the M/S Christer Salen, one day out of Yokohama, bound for Vancouver, B. C., was proceeding at a speed of approximately 12 knots into a heavy sea, when without warning and for no apparent reason she suddenly split in two at about the middle of No. 3 hold. The forward part, after being jammed by a sea into the after part, floated off and sank with the consequent loss of all cargo therein. The after part returned without incident to Yokohama. The cargo in No. 4 and No. 5 holds sustained only slight damage.

The cargo owners filed the libels in which the interlocutory decrees here appealed from were entered. The vessel owners filed cross-libels against the owners of the saved cargo, claiming contribution for general average, and petitioned for a limitation of liability.

Subsequent tests revealed that the break was "a brittle fracture" originating in the starboard sheerstrake, i.e., the uppermost longitudinal hull plating on the starboard side, somewhere in its 7½" extension above the main deck.

The M/S Christer Salen, a general dry cargo ship, 405 feet long, 56 feet wide, with a gross tonnage of 4,900 tons, was one of a class of nine ships built at the Eriksberg Yard, Gothenburg, Sweden. The steel for the ship was rolled in Germany in 1943 and her construction was completed in 1944. Her hull was all welded and riveted to the frames. She began operating in 1945 at which time she obtained the standard ship classification of Lloyd's Register of Shipping, namely, 100-A-1. She retained this classification until she split in two.

In January 1950 she ran aground in the Phllippines; permanent repairs were made in the Swedish yard; and in May 1950 a certificate of seaworthiness was issued by Lloyd's, continuing her 100-A-1 classification. In November-December 1950 while the Christer Salen was en route from Vancouver, B. C. to Kobe heavy weather caused a

crack at the top of its portside bulwark welded to the port sheerstrake where the bulwark joined the bridge front. This crack was v-ed out and welded. Between January 6 and January 8, 1951, only a month before the disaster, the ship was drydocked at Hong Kong for normal maintenance purposes, viz., cleaning, scraping, and painting, and inspected by a Lloyd's surveyor who found that her "shell plating" was "in good condition" and recommended continuance of its classification (Exh. NN).

Were it not for the forceful arguments advanced by the apellant cargo owners, we would have thought it a foregone conclusion that no liability could attach to the carrier under the Carriage of Goods by Sea Act, 46 U. S. C. A. sections 1304(2)(p) and (q), which provides that "Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from • • • (p) Latent defects not discoverable by due diligence; and (q) Any other cause arising without the actual fault and privity of the carrier and without the fault or neglect of the agents or servants of the carrier • • •." To understand the appellants' argument a brief description of the physical phenomena producing the fracture is necessary, which phenomena were explained in great detail at the trial by experts called by the parties.

In the 1940s disasters similar to that which befell the Christer Salen occurred in some other classes of cargo ships having all-welded hulls. Liberty ships seemed particularly prone to this affliction and in fact were the only class of dry cargo ships which displayed any such affinity. Some tankers having all-welded hulls, most notably T-2's, also had a tendency to fracture. This tendency to fracture was not and never has been present in ships having riveted hull seams.

The first explanation for major fractures not attributable to external forces, such as extremely heavy weather, occurring in welded ships was that they were monolithic

structures, which owing to their lack of elasticity possessed locked-in stresses. On the other hand, on riveted ships there is a certain amount of play between the plates, and, while the plates may be sprung when subjected to sudden and extreme stress, the riveted seams will generally absorb the internal stresses which cause the major fractures on welded hulls. This explanation is now hotly disputed by protagonists of the welded hull. They claim that poor steel and poor design will produce as many fractures in riveted ships as they do in welded ones. What prevents major fractures in riveted ships is that the break will stop at the first riveted seam in place of running all the way down the hull.

The fact that a fracture will stop at a riveted seam promoted the superimposition of riveted bands, called crack arresters, on those welded ships, such as T-2's and Liberties, having a tendency to fracture. There are two varieties of crack arresters; in one type longitudinal slots are made in the hull or deck, with riveted straps then fitted over the slots; the other type consists of riveted gunwale bars inserted between the stringer plates and sheerstrakes.[1] The evidence conclusively shows that crack arresters do the job which they were designed to do. The arguments advanced by the shipowner based on the testimony of Murray, a representative of Lloyd's, to justify Lloyd's failure to require crack arresters on the vessel were that the fitting of crack arresters might have caused notches which could have been the starting point of fractures and that crack arresters do not stop cracks.

The theory that crack arresters might have done more harm than good is pure speculation contrary to scientific facts and conclusively disproven by actual experience with

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[1] After the casualty here, Lloyd's recommended that the Christer Salen, as rebuilt, and her sisterships, be outfitted with crack arresters, and in 1954 promulgated a rule that every ship over 350 feet in length having an all-welded hull will normally be required to have crack arresters.

crack arresters. Commenting upon the efficacy of crack arresters the report of the United States Navy Ship Structure Committee published in 1948—three years before the accident here—stated that "The evidence that cleavage fractures do not pass riveted seams is now based on 15,000 ship-years service" (Exh. 21, p. 4). There is no evidence of any major fracture originating at crack arresters, and good workmanship would prevent the occurrence of any notches. Furthermore, in 1950 Lloyd's could not have been overly impressed by this fancied danger, since in 1947 it required crack arresters on sixty T-2's classified by it.

The claim that crack arresters are ineffective is also at odds with established fact. The sole support in the record for this position is the fact that two T-2 tankers fitted with crack arresters broke up in a severe storm off Cape Cod in February 1952. Even accepting as true the proposition that the cracks were not stopped at the crack arresters on these two ships, it is difficult to see how Lloyd's could rely on this fact in 1950 and 1951 since the accidents did not occur until 1952. But the proposition is not true. Lieutenant Commander MacCutcheon, one of the foremost authorities on structural failures in welded ships, had knowledge of the crack-ups of these two T-2's and testified that the fractures on these two vessels did not pass through the arresters, but actually stopped at the arresters and then ran back to them. The fact that crack arresters will not transform a ship into an impregnable floating fortress immune from all sea perils does not mean that they are ineffective.

There was testimony that the fractures which pose the gravest threat to the integrity of the ship are those which occur in notch brittle steel as opposed to those which occur in ductile steel. In notch brittle steel the break will be sharp, whereas in ductile steel the break will be fibrous. As temperatnre lowers, any steel will lose some of its ductility. Those which lose most of their ductility at normal operating temperatures are classified as notch brittle.

Notch brittleness is characterized by a high carbon to manganese ratio. The steel in the Christer Salen's starboard sheerstrake had a high carbon content and became notch brittle at 30° F.

Even an all-welded hull of notch brittle steel which has no crack arresters and is subjected to heavy stresses, however, will not fracture usually unless a notch is present in one of the plates. Such a notch must therefore have been present in the extension of the starboard sheerstrake of the Christer Salen. The notch could have been put into the sheerstrake either by external damage, or by a latent defect in a weld or in the steel itself.

I. The Duty to Install Crack Arresters

Against this background appellants' arguments can be set forth and assessed. Appellants claim that since the Christer Salen had notch brittle steel at normal operating tempertures, and since crack arresters were well known as an effective means of preventing fractures on all-welded, notch brittle ships, the owner of the Christer Salen was under a duty to install crack arresters. They point out that this installation could have been easily accomplished when she was at her home yard in 1950 at the relatively insignificant expense of $10,000.

The ship owner, however, did not know that the Christer Salen was notch brittle and therefore susceptible to a brittle fracture, and it is our opinion that in the exercise of due diligence a reasonably prudent owner would not have been required to install crack arresters on the Christer Salen prior to 1951 because it was unforeseeable that the ship was actually notch brittle.

Appellants rely on the facts that the steel in the Christer Salen was rolled in Germany in 1943 and that after July 1943 Lloyd's became suspicious of the quality of German steel and thereafter would not accept the stamps of approval by Lloyd's agents in Germany but would conduct

tests to verify the results on the German certificates. However, no test in 1943 or 1944 was in existence which would reveal the notch brittle quality of a steel, and at that time the dangers of such steel were just being uncovered. Liability cannot be imposed for failure to safeguard against a hazard not then generally known in the shipbuilding industry and for failure to conduct non-existent tests.

Appellants' argument therefore comes down to the following proposition: that any owner of an all-welded ship who did not definitely know that his ship was not notch brittle was required at the earliest feasible time to outfit her with crack arresters. We think such a rule imposes too broad a standard of liability. The Christer Salen had been roaming the seven seas for years without displaying the slightest indication of her latent unseaworthiness; the operation of her eight sisterships likewise furnished no clues of any inherent danger.

Had the Christer Salen been of a class with a known predilection for cleavage fractures, such as Liberties, appellants would have a far stronger case. As it is, the Christer Salen did not contain any design features similar to those which were responsible for the vast majority of major fractures in Liberties. Over 75% of the fractures on Liberties started either at the sharp-edge hatch corners or at the cutouts made into the top of the sheerstrakes amidships for accommodation ladders. The hatch coamings on the Christer Salen were rounded and her gunwale tops were smooth.

Appellants also claim that Lloyd's requirements in 1947 that T-2's have crack arresters is some evidence that it should have done likewise with the Christer Salen. Aside from the fact that T-2's also displayed marked tendencies to fracture, the dissimilarity in design between tankers and dry cargo ships prohibits any such inference. The stresses in a tanker are generally much more severe than in a dry cargo vessel and are concentrated in the lower portion of the hull, whereas the stresses in a dry cargo ship are most severe in the uppermost part of the hull.

The recent case of *States Steamship Co., et al.* v. *United States, et al.*, 9 Cir., Nov. 15, 1957, 259 F. 2d 458, is distinguishable for similar reasons. In that case the SS Pennsylvania sunk with all hands, apparently because of a major fracture. The twenty-two foot crack in her deck which occurred on the voyage immediately preceding the disaster should have put the owner on notice that he had an unseaworthy vessel.

II. Was the Notch a Discoverable Defect

As an alternative theory appellants claim that the notch was a discoverable defect, or at the very least the ship owner has not shown that it was not.[2] The trial court rejected this theory in finding that the notch was a latent defect. We reach the same result as did the court below but through a different reasoning.

The basis for finding that the notch was a latent defect present in the sheerstrake when the ship was built was the expert testimony of Murray and Ibison, two ship surveyors for Lloyd's. While both men were emphatic in concluding that the notch was a latent defect, they were in disagreement on the nature of the notch. Ibison testified that it must have been a slag inclusion within the steel of the sheerstrake itself. Murray rejected this hypothesis and stated that it must have been a micro-crack in the center of a weld or in a weld junction.

In our opinion it is not necessary and virtually impossible to state with any degree of certainty what actually caused the fracture.

On this phase of the case, all the ship owner need establish is that normal precautions were taken to see that a discoverable notch did not exist. Appellants rely on the fact that there is no affirmative proof that such a defect was not present when the ship left Yokohama. However,

[2] 46 U. S. C. A. section 1304(1) places the burden of proving the exercise of due diligence on the ship owner.

if positive evidence were required to establish a negative proposition of fact (here absence of a discoverable defect), no carrier could ever discharge its statutory burden of proof. A month prior to the fracture a third party, Lloyd's ship surveyor at the Hong Kong drydock, inspected the shell and found it to be in good condition. This party was qualified to make the inspection and the inspection was made in the regular course of his business. Unless there is some evidence of bias, incompetence or fraud, the report (Exh. NN) must be accepted at its face value. Appellants have stipulated that the Hong Kong surveyor would have testified in accordance with this report (Exh. A).

From the time the inspection was made to the date the Christer Salen put out of Yokohama, she was not subjected to heavy weather. Neither the testimony of the master and chief mate nor the records kept by the ship reveals any accident which could have caused noticeable damage to the sheerstrake. The captain testified that he observed no damage to the sheerstrake and that no such damage was reported to him.

Appellants point out that the master was unaware of the potential danger in welded ships of cleavage fractures and therefore took no special pains to scrutinize the tops of the sheerstrakes. This lack of knowledge coupled with the failure to conduct a rigorous inspection, it is argued, precludes a finding of due diligence. While a master is presumed to know the general characteristics of his ship, he is not required to possess the combined knowledge and skill of a naval architect and metallurgist.

Upon all the evidence the trial court was clearly justified in finding that the accident was not attributable to a lack of due diligence on the part of the ship owner. The facts and law applicable thereto cannot support a conclusion that the ship owner should be held liable for this unfortunate but unforeseeable disaster.

The decree appealed from is affirmed.

Judgment

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-seventh day of August one thousand nine hundred and fifty-eight.

Present:

HON. HAROLD R. MEDINA
HON. STERRY R. WATERMAN
HON. LEONARD P. MOORE
Circuit Judges.

PETER PAUL, INC., et al and WESTERN HARDWOOD LUMBER, et al.,
Libellants-Appellants,

v.

M/S "CHRISTER SALEN" et al,
Claimant-Respondent-Appellee,

REDERI A/B JAMAICA, et al,
Respondents-Appellees.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the

Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the decree of said District Court be and it hereby is affirmed; with costs to the appellee.

A. DANIEL FUSARO
Clerk

(Seal)

Order Denying Petition for Rehearing

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the tenth day of October, one thousand nine hundred and fifty-eight.

Present:

HON. HAROLD R. MEDINA
HON. STERRY R. WATERMAN
HON. LEONARD P. MOORE
Circuit Judges.

PETER PAUL, INC., et al.,
Libellants-Appellants,

v.

REDERI A/B PULP,
Claimant-Respondent-Cross
Libellant-Appellee, et al.

A petition for a rehearing having been filed herein by counsel for the appellants,

Upon consideration thereof, it is

Ordered that said petition be and hereby is denied.

A. DANIEL FUSARO
Clerk

(Seal)

List of Petitioners

Peter Paul, Inc.
Wilbur-Ellis Co.
Joseph Fleming, an individual doing business as Joseph Fleming Co.
Louis Chen Kai, Louie Ok Chen, and Louie Fat Wah, co-partners doing business as Kwan On Wo Co.
Vitamins, Inc.
Western Hardwood Lumber Co.
American & Far Eastern Trading Co.
Belgo Canadian Manufacturing Co., Ltd.
Jess Kaplan, an individual doing business as M. Kaplan & Son
World Enterprises, Ltd.
N. Jorge da Silva
Harry J. Jordan
A. A. Sternoff, B. T. Sternoff, C. C. Sternoff and I. J. Sternoff, co-partners doing business as Sternoff Metals & Iron Works
H. Shiller, Inc.
Stedman Bros. Ltd.
Frank Hacking (Canada) Ltd.
Cobourg Matting & Carpet Co. Ltd.
Wm. Looser & Co. Ltd.
Robert Simpson, Ltd.
Zalkin, Inc.
Ehrlich Harrison Co.
James Fyfe
Butler Manufacturing Co.
Amberg & Bartlett, Inc.
The Otto Gerdau Company
Elliot Bay Mill Co.
Franklin Rug Co., Inc.
Rodriguez Rivas y Cia.
C. S. Jon, an individual doing business as Sam Yueng Co.

The T. Eaton Co., Ltd.
J. R. Shuttleworth, an individual doing business as J. R. Shuttleworth & Sons, Ltd.
Jan Barna
China Dry Goods Co.
Henry Pollok, Inc.
Reno Skin Co.
Irwin Specialty Co.
El Dorado Oil Works
E. J. Lavino & Co.
Alaska Fish Oil Extractors, Inc.
E. J. Griffith & Co., Inc.
Barclay & Co., Inc.
National Silver Co.
Kenneth Lim, an individual doing business as Sang Co.
Pacific Trading Co., Ltd.
American Import Co.
Hill & Cutler Co.
S. S. Kresge Co., Ltd.
Furuya Trading Co.
Sam Lung Jan, Ltd.
Allied Trading Corp.
H. Hacking Co., Ltd.
Jensen-McLean Co., Ltd.
International Factory Sales Service, Ltd.
Isaac B. Cohen & Sons Corp.
George H. Maus, Inc.
E. J. Guetta, Inc.
Noritake Co., Inc.
Pansy W. Wu
George S. Fujii, Toshio Fujii, Mary M. Fujii and Robert Y. Nakatsu, individuals doing business as Fujii & Company

C. T. Takahashi, an individual doing business as Takahashi & Co.
H. E. Bojesen
T. Ross Currie
R. Butt
Cecilia Koo
C. Ling
J. E. B. McPhail
Herbert Hecht and Leon Hecht, co-partners doing business as D. Hecht & Co.
National Carbon (Eastern) Ltd.
Dan Brechner, Joseph Brechner and Jack Brechner, co-partners doing business as Dan Brechner & Company
F. W. Woolworth Co.
F. W. Woolworth Co., Ltd., and
Nelson Bros. Fisheries, Ltd.

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Office Supreme Court, U.S.
FILED
JAN 16 1959
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 617

PETER PAUL, INC., *et al.*,

Petitioners,

—against—

REDERI A/B PULP,

—and against—

REDERI A/B JAMAICA, D/S A/S EIKLAND and SALAMIS A.S.,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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IN THE

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PETER PAUL, INC., *et al.*,

Petitioners,

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REDERI A/B JAMAICA, D/S A/S EIKLAND and SALAMIS A/S,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Proceedings Below

Petitioners are cargo underwriters, consignees, etc., suing to recover for loss or damage to cargo, shipped on board the m/s "Christer Salen", resulting from a hull fracture off the coast of Japan on February 15, 1951.

Respondent, Rederi A/B Pulp, was the owner of the "Christer Salen" and the other respondents were allegedly partners of Rederi A/B Pulp.

The District Court dismissed the libels and allowed recovery of general average.

The question involved turns on the application of Section 4 of the U. S. Carriage of Goods by Sea Act, 46 U. S. Code, Section 1304, which reads:

> "(1) Neither the carrier nor the ship shall be liable for loss or damage arising or resulting from unseaworthiness unless caused by want of due diligence on the part of the carrier to make the ship seaworthy, and to secure that the ship is properly manned, equipped, and supplied, * * *.
>
> (2) Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from—* * *
>
> (p) Latent defects not discoverable by due diligence;"

Judge McGohey made 51 detailed findings covering 14 pages (A1 to 14, attached to petition). His conclusion was that the carrier had exercised due diligence and that the loss of the fore-part of the ship was due to a latent defect not discoverable by due diligence (reported, 152 F. Supp. 410). The Court of Appeals affirmed his decision (reported 258 F. 2d 901), and petitioners' motion for a rehearing, was denied (Petit., p. 2).

The rule that concurrent findings of fact will not be reviewed applies. *Just* v. *Chambers*, 312 U. S. 383; *Coryell* v. *Phipps*, 317 U. S. 406.

The case at bar is of interest only to the parties; there are no "special and important" reasons why a writ of certiorari should be granted (Rule 19.1.b).

This case cannot be a controlling precedent as respects any other. All that was decided was the issue

of due care in the light of particular facts. There is no conflict with any decision in another circuit nor with applicable local law.

(1) Circumstances of the Loss.

On February 14, 1951, at 5:12 P. M., the "Christer Salen" left Yokohama, Japan, bound for Vancouver, B. C., as her first port of call (Fdg. 21, at p. A6).

She was well manned, well fitted and considered completely seaworthy (Resp. Appx. 136a, 164a).*

During the evening, the wind increased in violence and the ship had to be hove to on account of the storm (Appx. 164a, 165a).

In the early morning of the 15th, the deck cargo lashings on the after deck became slack on account of the violent pitching and tossing and had to be tightened by the crew. In order to do this, it was necessary to put the ship's head to the wind to prevent the crew being washed overboard (Fdg. 22, at p. A6, Appx. 9a, 165a).

The mate on watch testified that this was the heaviest weather he had ever experienced, both in strength of wind and sea (Appx. 165a).

At 4 P. M. on the 15th, when there was an abatement in the weather, the ship was proceeding at "slow" (Ex. H, p. 2).

* The printed appendices which were filed in the Court of Appeals and in this Court are numbered consecutively, commencing with 1a and they will be so referred to in this brief.

At 4:13 P. M., the master directed the chief engineer to accelerate the engines to 80% of normal full speed (Fdg. 23 at p. A7).

At about 6:45 P. M., on the 15th, a wave of unusual proportions was seen close by on the port bow (Appx. 136a, 137a). When the ship's midship section was lifted by this wave the stress initiated a crack in the upper part of the starboard sheer strake (Fdg. 29, at p. A8). The crack spread rapidly in the plating, and the ship was severed into two parts at about the middle of No. 3 hatch (Fdg. 25, at p. A7).

The forward and after part of the ship separated, and the forward part of the ship, together with all the cargo therein, was lost in the storm (Fdg. 26, at p. A26). The after part of the ship was navigated back to Yokohama with outstanding seamanship on the part of the master (Fdg. 27, at p. A7).

On arrival at Yokohama, the face of the fracture was examined by Mr. Reginald Ibison, Senior Surveyor of Lloyd's Register for Japan. Mr. Ibison had had extensive experience as a naval architect and ship surveyor, and had participated in meetings of the Admiralty Ship Welding Committee (Appx. 171a). Mr. Ibison's conclusion, which was concurred in by all of the experts, was that the fracture was due to a latent defect in the upper part of the starboard sheer strake (see infra, p. 11).

(2) Prior History of the "Christer Salen".

The "Christer Salen" was built in the Eriksberg Shipyard at Gothenburg, Sweden (Finding 12 at p.

A4), which is one of the three largest in Sweden (Appx. 174a).

She was launched in September 1944 and completed in February 1945 but because of World War II, was not put into service until June 1945 (Fdg. 12 at p. A4). Following prevalent practice, her plates were welded one to the other and attached to the frames by rivets (Fdg. 12, at p. A4).

She was classed 100-A1 by Lloyd's Register of Shipping and she remained until the casualty, out of which this litigation arose (Fdg. 13, at p. A4).

In early 1950, while trading in the Philippines, she ran ashore, resulting in serious damage to her forefoot (Fdg. 14, at p. A4), and had to be sent to Gothenburg for repairs.

At the conclusion of these repairs, certificates were issued, confirming that all damage had been repaired and that the "Christer Salen" was seaworthy (Fdg. 15 at p. A5). Lloyd's surveyor and owner's surveyor testified that they had gone over the vessel with the greatest care and could find no defect (Appx. 166a-168a).

In May 1950, the "Christer Salen" left Gothenburg (Fdg. 16, at p. A5), proceeding to the Far East where she loaded cargo for the West Coast of North America.

She then loaded a return cargo for Japanese and other Far East ports, sailing from Vancouver for Kobe on November 21, 1950 (Fdg. 17, at p. A5).

Between January 6 and 8, 1951, when at Hong Kong she was drydocked and inspected by the surveyor to Lloyd's Register, who found her hull and other parts in good condition (A5 and A23). The "Christer Salen" then called at Philippine and Japanese ports, at which cargo was loaded, sailing from Yokohama on February 14th, as previously stated.

FIRST POINT

The only questions presented in this case are of fact which were decided in respondents' favor in the District Court and affirmed by the Court of Appeals.

Commencing at Finding 35, the Findings read (p. A-9):

> "35. The fracture started at a notch in the sheer strake plate. The notch was present when the plate was put into the vessel and made her unseaworthy when she sailed from Yokohama.
>
> 36. At and prior to July 1943, when the plates subsequently incorporated in the 'Christer Salen' were rolled, the then known tests for ship's plates were not designed to, and in fact did not, disclose the existence or non-existence of notch brittleness in such steel.
>
> 37. The steel used in building the 'Christer Salen' complied with all of Lloyd's then existing requirements. At the time of the accident the vessel was classed 100-A-1.
>
> 38. The notch constituted a latent defect, which the owner could not discover by means of any known or customary test."

The findings fully establish that the fracture was due to a latent defect not discoverable by due diligence for which the carrier is not liable under the Carriage of Goods by Sea Act, *supra*, p. 2, and in the following cases it was held that there was no liability for loss or damage to cargo under such circumstances.

Balfour Guthrie & Co. v. *American West African Line*, 136 F. 2d 320, C. C. A. 2;
The Toledo, 30 F. Supp. 93, affirmed 122 F. 2d 255, C. C. A. 2;
The Quarrington Court, 122 F. 2d 266, C. C. A. 2;
The Floridian, 83 F. 2d 949, C. C. A. 2;
Angliss v. *P. & O. Steam Nav. Co.*, L. R., [1927], 2 K. B. 456.

Petitioners admit in their petition for re-hearing (p. 1) that the Court of Appeals "made a careful study of the technical problems" involved and that its opinion was a "thoughtful" one.

The petition for re-hearing further states at p. 4:

> "This Court said (at p. 2263) that whatever may have brought about the fracture 'all a shipowner need establish is that normal precautions were taken to see that a discoverable notch did not exist.' We agree that that is a fair statement of the shipowner's obligation * * *."

It is obvious from the foregoing that, by petitioners' own concession, the Court of Appeals, fully understanding the factual and legal principles applicable, nevertheless affirmed the decision of the District Court and denied the petition for re-hearing.

Petitioners claim (petition p. 6) that the finding of the District Court (No. 38, p. A9), that the notch in the sheer strake was a latent defect which could not be discovered by means of any "known or customary test", was reversed by the Court of Appeals. This, however, is an obvious error. At page A-22, the Court of Appeals said:

> "The trial Court rejected this theory [of the petitioners] in finding that the notch was a latent defect. We reach the same result as did the Court below * * *."

This was an affirmance of the District Court's finding.

The Court of Appeals then refers to the testimony of Mr. Murray and Mr. Ibison. Mr. Ibison, Lloyd's Senior Surveyor for Japan, examined the place of fracture immediately after the "Christer Salen" arrived at Yokohama (Appx. 118a). Mr. Ibison, who, of course, had the advantage of examining the place of fracture, found slag inclusions, and his testimony indicated that the slag inclusions were the initiating cause of the fracture. Mr. Murray, on the other hand, preferred the theory of a micro-crack (Appx. 49a) which, although very minute when the plate was manufactured, would continue to increase in size through the strains met with by the ship (Appx. 36a). The Court of Appeals held, with obvious correctness, that it was virtually impossible to state "with any degree of certainty" which of these two expert theories was correct.

Under the decision in *McAllister* v. *United States*, 348 U. S. 19, the findings of fact of the District Court

are not reviewable on appeal unless they are found to be "clearly erroneous", and unless the reviewing Court is left "with the definite and firm conviction that a mistake has been committed."

In the case at bar, the findings of fact of the District Court have been unanimously affirmed by the Court of Appeals, with the result, it is respectfully submitted, that they will not be reviewed by this Court.

As the findings of fact dispose of the litigation, there is no bona fide ground on which this petition for certiorari can be supported.

Also, in view of the decision in *McAllister* v. *United States, supra, "the burden of proof" on which petitioners rely is no longer of importance.*

The question for consideration by the Court of Appeals and by this Court is not whether the burden of proof has been sustained but whether the findings of the District Court were "clearly erroneous."

Even in the trial court, the burden of proof is unimportant, except when the evidence is equally balanced. If the trier of facts finds that there is a preponderance of evidence in favor of one side or the other, then questions as to the burden of proof disappear.

> Corpus Juris Sec., Article on Evidence, Volume 32, p. 1052;
> *Chicago etc. Transit Co.* v. *Moore*, 259 Fed. 490, at 494, C. C. A. 6.

To sustain the burden of proof, a showing of greater probability is all that is required.

Chicago etc. Transit Co. v. Moore, supra; McAllister v. United States, supra, 348 U. S. at p. 22.

The District Court reached its conclusions after the termination of a ten-day trial and consideration of the lengthy testimony of twelve witnesses and one hundred exhibits. Five witnesses testified in open court.

A. There was never any exterior damage to the sheer strake.

Petitioners suggest that the sheer strake might have suffered exterior damage before the ship sailed from Yokohama and that it was this supposititious exterior damage, and not the latent defect testified to by the expert witnesses, which caused the fracture and loss of the forepart of the ship.

There is not even a scintilla of evidence that the sheer strake ever suffered any exterior damage, and there is both positive and negative evidence that no such damage was sustained.

The "Christer Salen" was surveyed at Hong Kong between January 6 and 8, 1951, by the surveyor of Lloyd's Register who found her shell plating in good condition (Fdg. 18 at p. A4); this finding is emphasized in the opinion of the Court of Appeals at p. A23.

After leaving Hong Kong, the "Christer Salen" loaded in the Philippines and Japan before sailing from Yokohama on February 14th.

There is not the slightest hint in the record that any damage to the sheer strake could have been sustained between the survey at Hong Kong and February 14th, when the "Christer Salen" sailed from Yokohama.

The sheer strake was a steel plate .65 of an inch thick (T. M. p. 248) and could have been damaged only by very severe contact with a hard and heavy object.

As soon as the "Christer Salen" had returned to Yokohama, Mr. Ibison, Lloyd's Senior Surveyor for Japan, made a careful examination of the sheer strake and other parts of the hull to ascertain the cause of the fracture. He testified that he could find no evidence to support the unproved assumption of petitioners' counsel that there was a nick or break at the top of the sheer strake (Resp. Appx. 128a), and, in answer to the suggestion that the dropping of a piece of "metal cargo" might cause a sharp "V" indent in the sheer strake, testified:

> "I have never in my own experience either seen or even heard of a fracture initiating in the type of thing you are talking about now" (Appx. p. 128a).

None of the ship's officers testified that they had any knowledge of any "nick or break" in the sheer strake.

After the ship had returned to Yokohama, a Maritime Declaration required by Swedish law was held at which the master and officers of the ship testified. Counsel for petitioners read parts therefrom in his cross-examination of the ship's witnesses; in no part

thereof is there any mention of a nick or break in the sheer strake, nor is there any mention of such a nick or break in the letter which the master wrote to his owners on March 9, 1951 (Ex. GG), in which he recited the events leading up to the casualty.

There is no mention of any such nick or break in the ship's logs, although any damage sustained by the ship, even of an unimportant nature, is entered therein as a matter of course.

The District Court found that the sheer strake had not sustained any exterior damage (Finding 51, at p. A 11), and this finding was concurred in by the Court of Appeals (at p. A. 23).

The hull fracture which was initiated in the sheer strake is amply explained by the latent defect therein found by Mr. Ibison. All of the experts, including Mr. MacCutcheon, called by petitioners, agreed that the fracture was due to a latent defect (Appx. 171a, 34a, 35a, 140a, 36a; T. M. pp. 710, 712, 161a, 162a).

There is no duty to use due diligence to look for a non-existent defect. *The Touraine,* L. R. [1928]. P. D. 58, at bottom of page 68.

Even under the Harter Act, the making of an inspection which would not have revealed any defect, is not required. *The Indrani,* 177 Fed. 914, C. C. A. 2. In that case, the Court said, p. 915:

> "A plain and satisfactory explanation of the break of the pipe on the voyage having been given, and there being uncontradicted testimony that the appearance of the break showed that it was sud-

> den and fresh and not the result of gradual deterioration, we cannot presume that, if an inspection had been made of the pipe before the voyage began, any indications of a coming break would have been discovered."

In the present instance, the fracture of the ship's hull has been logically and satisfactorily explained as being due to the presence of a latent defect which, as admitted by petitioners' counsel, see p. A. 12, could not have been ascertained by the use of due diligence.

Petitioners' suggestion that there was a nick or break in the sheer strake when the ship sailed from Yokohama is a mere figment of the imagination.

Even Mr. MacCutcheon, petitioners' expert, admitted that respondents' explanation of the cause of the casualty was correct (Appx. 161a-162a).

B. The asserted obligation to install crack arresters.

The subject of crack arresters is dealt with in Findings 41-45, at p. A-10, as follows:

> "41. Crack arresters do not prevent the occurrence of cracks in ships, nor do cracks always stop at an arrester.
>
> 42. By 1950 the United States had installed crack arresters in less than half of its completely welded vessels built during World War II.
>
> 43. The American Bureau of Shipping did not then and does not now require the installation of crack arresters in welded vessels which were built without them. Neither does it require crack arresters in new buildings.

44. The information as to welded ships which was gathered in the United States was communicated to those in Great Britain interested in the subject, including the Admiralty Ship Welding Committee and Lloyd's.

45. Lloyd's rules, up to the time of this disaster, did not require the owner of the 'Christer Salen' to fit her with crack arresters, nor did Lloyd's suggest that crack arresters be installed during the repair of the stranding damage in 1950".

Until their defeat in the District Court, petitioners' main, if not their sole, contention was that the "Christer Salen" was unseaworthy because crack arresters had not been installed. In dealing with this contention, Judge McGohey said: (at p. A12)

> "The libellants do not contend that the owners' failure to discover the defect in the starboard sheer strake plate constituted lack of due diligence. They contend rather that in light of the 'mass of data known to all those interested in shipping, long before 1950, establishing the dangers presented by a welded ship; * * * in the exercise of ordinary prudence, Lloyd's, as the vessel owners' agency which it employed to make the vessel seaworthy, should have required the installation of crack arresters when the vessel was being repaired at Gothenberg in 1950'; that Lloyd's was negligent in failing so to require and its negligence 'was lack of due diligence by the vessel owner.'
>
> These contentions are rejected."

The "Christer Salen" was completed in February 1945 and, at that time, the crack arrester was a wholly experimental device.

It was not until July, 1946 (Fdg. 40, at p. A9-10), that the Navy Board approved the installation of crack arresters in the poorly constructed ships, built as a part of the war program, and even then the approval was provisional and later withdrawn, since in 1950, *four years later*, out of 4712 welded steel merchant vessels built by the Maritime Commission, crack arresters had been installed in only 2000 (Fdg. 42, at p. A10). Most of these crack arresters were installed in the 2710 "Liberty" ships; nevertheless, many Liberties were not "strapped" (Appx. 151a). Crack arresters were *not* installed in the "C" type vessels which were of a size and type similar to the "Christer Salen" (Appx. 151a, 162a).

It has frequently been held that shipowners are not required to install every new invention or device under penalty of the ship's being held unseaworthy if they fail so to do.

Spang Chalfant & Co. v. *Dimon SS Corporation*, 57 F. 2d 965, C. C. A. 2;
The Cabo Hatteras, 5 F. Supp. 725, 736, S. D. N. Y.;
Virginia Carolina Chemical Co. v. *Norfolk & North American SS. Co.*, 17 Com. Cas. 277.

There is in fact no substantial disagreement between the U. S. Maritime Commission, the American Bureau of Shipping, the Admiralty Ship Welding Committee and Lloyd's Register of Shipping as to

the installation of crack arresters in ships already built.

The evidence shows that all four authorities agreed that crack arresters need not be fitted in dry cargo vessels of the better class.

Respondents were not required to go behind the certificate of Lloyd's Register and install a device which Lloyd's would have advised against.

In *Riverstone Meat Co.* v. *Lancashire Shipping Co.*, decided in the Queen's Bench Division in July 1958, reported in Vol. 3, Weekly Law Reports at p. 482, and in 1958 Lloyd's List Law Reports, Vol. 2, p. 255, where in a cargo damage case it was asserted that the ship's construction was improper despite the fact that she had been classified by Lloyd's for many years previous, the Court said, p. 497:

> "I accept and apply the observation of Mr. Justice Devlin in *Waddle* v. *Wallsend Shipping Company, Ltd.*, [1952] 2 Lloyd's Rep., at p. 130, that to require a shipowner to go behind the classification society's certificate would involve a retrogression beyond the point to which a reasonable shipowner can be expected to go."

SECOND POINT

The cases cited by the petitioners are all distinguishable.

In none of the decisions of this Court which are cited was the United States Carriage of Goods by Sea Act applicable, which, of course, differs widely from the Harter Act of 1893.

The Carriage of Goods by Sea Act, as is well known, enacts the Rules which were approved by the International Conference on Maritime Law, held at Brussels in 1922. These Rules have also been enacted in Great Britain and all her Dominions and Colonies, and in many European countries, as well as in the United States.

Petitioners cite *The Vallescura*, 293 U. S. 296, at pp. 9 and 10. In that case, the cargo had been damaged by two causes, for one of which the ship was liable and for the other of which the ship was not liable. This Court held that, under the facts of that case, the burden rested upon the ship to separate the two causes of damage.

The Isis, 290 U. S. 333, cited by petitioners, pp. 9 and 17, held that, in order to be entitled to the exemptions afforded by the Harter Act, the shipowner must prove that his ship was in all respects seaworthy, even if the alleged unseaworthiness had no connection with the loss. This is not the rule under the Carriage of Goods by Sea Act.

The Wildcroft, 201 U. S. 378, cited at page 10, is another Harter Act case, where this Court held that, under the Harter Act, a ship would not be presumed to be seaworthy.

At page 11, petitioners cite *Commercial Molasses Corp. v. New York Tank Barge Corp.*, 314 U. S. 104, where this Court held that, in the case of a so-called private carrier, the burden was on the cargo owners to prove unseaworthiness.

Any burden which may have rested on the respondents in the present instance has been fully sustained. Supra, pp. 9-13.

In *Nederlandsche etc. v. Mediterranean Traders Inc.*, 17 F. 2d 586, cited by petitioners at page 11, a Harter Act case, it was held that the burden imposed under the Harter Act had not been borne because the evidence was "wholly unsatisfactory" (p. 587).

The evidence in the case at bar was completely satisfactory, as shown by the findings of the District Court, and their affirmance by the Court of Appeals.

At page 12, petitioners cite another Harter Act case, *Loveland v. Bethlehem*, 33 F. 2d 655, where the Court said it was not sufficient to show a state of facts from which the Court could not discover how the disaster occurred.

Hudson River Shipyards Corp. v. Metropolitan Sand & Gravel Co., 104 F. 2d 167, C. C. A. 2, was a towage case not involving the carriage of goods by sea. The Court held that there was no obligation to make tests of the machinery of the tugs "not cus-

tomarily made," but that evidence should be offered as to whether the machinery was new or not and, if secondhand, its condition on purchase. The respondents fully complied with any obligations laid down by the Court in *Hudson River Shipyards* v. *Metropolitan Co., supra,* but, even if that were not the case, it would be entirely competent for the Court of Appeals for the Second Circuit to modify or even overrule its earlier decisions.

At page 14, petitioners cite among other cases *The Oritani*, 54 F. 2d 1075, C. C. A. 3, affirming on opinion below 40 F. 2d 522. In that case, the steamer "Oritani," soon after sailing from a West Indian port, stranded, causing serious cargo damage. It was the claim of the cargo that the stranding was due to a defective compass. The Court found that the compass was not defective and that the loss was due to an error in navigation for which there was no liability under the Act. That decision does not help the petitioners.

At page 16, petitioners cite *The Silverpalm,* 94 F. 2d 776, 9th Circuit, a collision case and, consequently, not pertinent as regards the Carriage of Goods by Sea Act. The ship's engines were so constructed that she could not reverse them promptly and this led to the collision. The master did not know of this peculiarity of the ship.

In *Standard Oil* v. *Clan Line,* 1924 A. C. 100, the ship was of the peculiar type known as a turret ship. The owners had been instructed by the shipbuilders that, if the ship were loaded with a homogeneous cargo, the ship's ballast must not be pumped out.

They did not notify the master of this information and, because of this failure on the owner's part, disaster resulted.

That case was not at all like the case at bar because it is well known to all masters and ship's officers that damage to a sheer strake, whether the hull be riveted or welded, creates a condition of danger. Under such circumstances, the difference, if any, between riveted and welded plates is immaterial. See *Louis-Dreyfus* v. *Paterson Steamships,* 67 F. 2d 331, C. C. A. 2.

States Steamship Co. v. *U. S.*, 259 F. 2d 458, C. A. 9, certiorari denied by this Court, January 12, 1959, cited by petitioners, p. 16, involved a disaster to a welded ship in which a crack arrester was fitted when she was built.

The ship involved, the "Pennsylvania", became a total loss with all hands while west-bound in the Gulf of Alaska in January, 1952. The "Pennsylvania" on a previous voyage had suffered a serious, 22-foot, crack in her deck, and this, the Court held, was a warning to her owners that under foreseeable conditions a second and more serious disaster was to be apprehended.

Until the accident of February 15, 1951, the "Christer Salen" had suffered no hull fracture and her steel was believed to be ductile and not brittle, A12.

The Court of Appeals considered the *Pennsylvania, supra*, clearly distinguishable from the case at bar, p. A22, and the denial of the petition for certiorari by this Court demonstrates that there is no conflict between the circuits.

The loss of the "*Pennsylvania*" demonstrates the futility of crack arresters to avert disaster.

Compania Generale v. *United States (The Elkton)*, 49 F. 2d 700, C. C. A. 2, cited by petitioners at p. 17; *The Fred E. Hasler*, 55 F. 2d 919, cited by petitioners at page 18; *Great Atlantic & Pac. Tea Co.* v. *Lloyd Brasileiro*, 159 F. 2d 661, cited at page 21, and *In re Spencer Kellogg*, 52 F. 2d 129, cited by petitioners at page 21, were all decisions in the Second Circuit. Without in any way admitting that there is anything in those decisions at all contrary to the result in the case at bar, it should be pointed out that it is clearly competent for the judges now sitting in the Court of Appeals for the Second Circuit to modify the conclusions of their predecessors, especially when interpreting a statute not passed on in the older cases.

With reference to the cases cited by petitioners on page 22, it is sufficient to say that, in *Hines* v. *Butler*, 278 F. 877, the shipowner was held entitled to limit his liability for loss of cargo by fire and that *Cornec* v. *Baltimore & O. R. Co.*, 48 F. 2d 497, was a suit by the shipowner to recover for loss by fire resulting from defective machinery used by the railroad company and no question of carrier's liability was involved.

LAST POINT

The petition for certiorari should be denied.

Dated, January 15, 1959.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 617

PETER PAUL, INC., *et al.*,
Petitioners,

—against—

REDERI A/B PULP,
Claimant-Respondent,

and

REDERI A/B JAMAICA, D/S A/S EIKLAND and SALAMIS A/S,
Respondents.

REPLY BRIEF ON BEHALF OF PETITIONERS

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Respondents' brief in opposition to the petition evades the issues raised by the petitioners, and aptly illustrates the importance of the questions involved and the reasons why the Writ should be granted.

At page 10 of their opposing brief, respondents say "There was never any exterior damage to the sheer strake". This statement assumes the desired conclusion. As pointed out in the petition (pp. 14-20) there is no evidence whatever establishing either the presence or absence of exterior damage to the sheer strake when the vessel sailed from Yokohama. The

decisions of this Court and of the Courts of Appeal for the Third, Fourth, Fifth and Ninth Circuits impose on respondents the burden of establishing the absence of such damage at that time; and the decision of the Court of Appeals for the Second Circuit sought to be reviewed here is in conflict with those decisions.

The truncated quotation from the opinion of the Court of Appeals in this case (p. 8 of respondents' brief) does not constitute an affirmance of the District Court findings. The portion quoted is followed by the words "but through a different reasoning"; and, (after an explanatory paragraph) by the statement "In our opinion it is not necessary and virtually impossible to state with any degree of certainty what actually caused the fracture." It is that finding of the Court of Appeals which requires corrective action by this Court.

Respectfully submitted,

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